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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

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December 22, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether, under the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 201(b), Petitioners own the copyright in a statue made by Respondent and others at Petitioners' request and expense and under Petitioners' direct supervision and control.

LIST OF PARTIES

1. Petitioners are the Community for Creative Non-Violence, an unincorporated association of individuals, and Mitch Snyder.
2. Respondent is James Earl Reid.
3. Ronald Purtee was named a defendant in the District Court; however, he did not appear before the District Court or the Court of Appeals.
4. The Copyright Justice Coalition, an ad hoc group of some fifty different organizations, filed an amicus curiae brief in the Court of Appeals in support of Respondent.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 846 F.2d 1485 (D. C. Cir. 1988), and is reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at App. 1a-28a. The opinion of the United States District Court for the District of Columbia is reported at 652 F. Supp. 1453 (D.D.C. 1987), and is reproduced at App. 29a-36a.

JURISDICTION

This case arises under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* Federal jurisdiction is founded upon 28 U.S.C. § 1338. After a bench trial, the District Court (Jackson, J.) entered judgment for Petitioners. The Court of Appeals (R. Ginsburg, J.) reversed and re-

manded in a decision rendered May 20, 1988. No petition for rehearing was filed. The Petition for Writ of Certiorari was timely filed on August 17, 1988, and was granted on November 7, 1988. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

Sections 101 and 201(a) & (b) of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 201(a) & (b), are set forth in the Petition for Writ of Certiorari at 2.

STATEMENT OF THE CASE

This case calls upon the Court to resolve a conflict among several circuits over the proper interpretation of the "work made for hire" ("work for hire") doctrine of the Copyright Act of 1976 ("Act" or "1976 Act"), 17 U.S.C. §§ 101 and 201(b). This doctrine provides that an "employer" owns the copyright in a work made by an "employee within the scope of his or her employment." The issue on which the courts have divided involves construction of the term "employee," which is not defined in the 1976 Act or in the Committee reports accompanying the Act. Consistent with case law developed under the Copyright Act of 1909, the Second Circuit has concluded that an employment relationship exists, for purposes of the 1976 Act, where the artist works at the request and expense, and under the supervision and control, of the hiring party; the Fourth and Seventh Circuits have followed this approach. The Fifth Circuit and the District of Columbia Circuit below, however, have expressly rejected the Second Circuit analysis and prior case law; they have concluded that only agency law employees, as determined by reference to certain Restatement of Agency factors, are copyright employees under the 1976 Act.

The dispute here concerns ownership of the copyright in a statue entitled "Third World America"— a contemporary Nativity scene depicting a homeless black family

huddled on a streetside steam grate. Petitioners are the Community for Creative Non-Violence ("CCNV"), a nonprofit unincorporated association of individuals dedicated to eliminating homelessness in America, and Mitch Snyder ("Snyder"), a member of CCNV. Respondent, James Earl Reid ("Reid"), is an artist.

The record below shows that CCNV members conceived of "Third World America," "in starkly specific detail," as the symbol of the cause they espouse. 652 F. Supp. at 1456 (App. 35a). CCNV selected Reid to sculpt the statue's figures, and paid his expenses ($15,000, which was to include the cost of maintaining his studio, purchasing the necessary materials, and the hiring of a dozen or so "assistants") during the seven-week period that he worked full-time on the CCNV project. Reid, who expressed sympathy with CCNV's cause and who apparently saw this as an opportunity to be associated with a highly publicized work of art, willingly agreed to forego a "salary" as such and to donate his services, like any other CCNV volunteer; he never bargained for copyright ownership with CCNV. CCNV assumed full responsibility for completion of other portions of "Third World America" and actively supervised and directed Reid's efforts. They insisted upon several significant details in the work (as well as its general design); rejected Reid's contrary suggestions; and set the deadlines for completion of the project. Throughout, CCNV members sought to "assure" that Reid "produced what they, not he, wanted" and that the statue "convey the message they had intended for it." 652 F. Supp. at 1456-57 (App. 35a).

After a two-day bench trial, the District Court below applied the Second Circuit supervision and control standard and found that CCNV and Reid had a copyright employment relationship for purposes of producing "Third World America." The Court of Appeals acknowledged that the parties satisfied the Second Circuit standard, but reversed because it concluded they did not have an agency law employment relationship. Petitioners submit that the

Second Circuit standard reflects a proper interpretation of the 1976 Act and that, under the circumstances of this case, the District Court's judgment should have been affirmed. Alternatively, if some other standard is to be applied, at the very least this case should have been remanded to the District Court to consider the facts in light of that standard.

1. Statement Of Facts

a. *Genesis Of "Third World America"*

The concept for "Third World America" originated with Snyder and other CCNV members who, in October 1985, decided to produce a work which would raise national consciousness for the plight of the homeless. From the outset, CCNV was quite specific about the work to be produced: CCNV determined that the work was to be a sculpture of a modern creche portraying two contemporary homeless adults huddled with their infant child on a streetside steam grate; that the family was to be black because most of the homeless in Washington, D.C. are black; that the figures were to be life-sized; that the steam grate would be positioned on top of a pedestal containing special effects equipment to produce steam swirling around the figures; that the work would be entitled "Third World America"; and that the base would bear the inscription "And Still There Is No Room At The Inn." 652 F. Supp. at 1454 (App. 30a).

CCNV planned to unveil "Third World America" in mid-December 1985 as part of the Christmas Pageant of Peace in Washington, D.C. The work was ultimately to be used as a "centerpiece of a one-or-two-year campaign of education and outreach and fundraising" for and concerning the homeless. 2/2 Tr. 24 (Snyder).[1] CCNV in-

[1] The designation "Tr." preceded by a date refers to the transcript of the trial before the District Court below, including the transcript of the hearing on the preliminary injunction motion (which was incorporated into the trial record). The name in parentheses indicates the identity of the witness.

tended to place the statue on display in major museums throughout the country, and to coordinate such displays with various educational activities, such as speaker series, musical events, and related photo and art exhibits. 7/25 Tr. 14 (Snyder). CCNV also intended to publicize "Third World America" in several media, such as posters, photographs and Christmas cards, as a "visual image representing homelessness in America" and as a means of raising money to deal with homelessness. 7/25 Tr. 14, 19, 29 (Snyder).

At the recommendation of Tom Lewis, an artist active in the homeless cause, Snyder contacted Reid in late October 1985 and explained the nature and purpose of the work that CCNV wished to produce. During the course of two telephone conversations, Reid agreed to sculpt the figures for "Third World America" and to do so, as CCNV insisted, in time for the Pageant of Peace. Snyder rejected Reid's proposal to cast the statue in bronze as too costly and time-consuming. 2/2 Tr. 143-44 (Reid). Reid agreed to cast the statue in a synthetic substance called "Design Cast 62," with which he had never before worked. 846 F.2d at 1487 (App. 3a); 2/2 Tr. 147 (Reid).

Snyder initially told Reid that CCNV expected to pay no more than $5,000 for the statue. 2/3 Tr. 156 (Reid). Reid said he would forego any salary and donate his services because he, too, sympathized with the homeless cause. 2/2 Tr. 146 (Reid). However, Reid estimated that his "costs," for which he expected reimbursement, would be between $12,000 and $15,000. 652 F. Supp. at 1454 (App. 31a). Reid explained the nature of these costs as follows:

> I needed a number of assistants and workers to assist me, and I needed materials, and I needed to maintain my quarters, so to speak, which included the rental of my studio and so forth.

2/3 Tr. 155-56 (Reid); *see* 7/25 Tr. 41 (Snyder). CCNV made periodic payments to Reid, and ultimately provided him the full $15,000. 652 F. Supp. at 1455 (App. 31a-33a). This amount was raised through a special auction of art works donated by artists who supported the "Third World America" project in order to benefit the homeless —and who were assured by CCNV that their efforts would not "go to another artist's profit." 2/2 Tr. 100 (Beck); *see* 7/25 Tr. 21 (Snyder); 652 F. Supp. at 1455 (App. 31a).

b. *Production Of The "Third World America" Figures*

With the help of some twelve "assistants," Reid worked full-time over a period of seven weeks sculpting the "Third World America" figures. 2/3 Tr. 189 (Reid). CCNV "monitored the progress of the work, not simply to approve Reid's embodiment of their idea, but to guide his expression and coordinate with his effort CCNV's construction of the steam grate pedestal." 846 F.2d at 1497 (App. 24a-25a). CCNV's supervisory efforts took several forms.

Snyder and other members of CCNV made some "ten to fifteen" trips to Reid's studio in Baltimore. Snyder testified that the purpose of these trips was "to make sure that the statue was what we [CCNV] wanted it to be." 7/25 Tr. 12 (Snyder); *see* 652 F. Supp. at 1455 (App. 32a-33a); 2/2 Tr. 52 (Snyder); 2/2 Tr. 73-74, 89-90 (Newman). According to Snyder, Reid was chosen by CCNV in part because of his geographic proximity to CCNV's shelter in Washington, D.C., thereby permitting CCNV to "work with him on a continuous basis . . . ." 7/25 Tr. 9 (Snyder). At CCNV's request, Reid also came to Washington, D.C. to observe the homeless, so that, in the words of Snyder, "he [Reid] could see up

close what it was that we wanted to create and get a sense of the feel of the image that we were working towards." 7/25 Tr. 11-12 (Snyder); *see* 652 F. Supp. at 1455 (App. 32a).

CCNV also required Reid to produce design sketches and photographs of the work-in-progress. 2/2 Tr. 39-41, 58-59 (Snyder). Reid testified that the sketches and photographs were created solely for "fundraising" purposes; CCNV witnesses, however, testified that these items also provided a means for checking Reid's work. 652 F. Supp. at 1455 n.4 (App. 32a); *see* 2/2 Tr. 39-41, 54 (Snyder); 2/2 Tr. 89 (Newman). Tom Lewis, the artist who recommended Reid and who "assisted" him essentially full-time in the sculpting of the statue, served as a liaison between Reid and CCNV so that CCNV could continuously monitor and approve the progress of the work. 2/2 Tr. 121-22 (Lewis); *see* 2/2 Tr. 53 (Snyder).

Throughout the process, CCNV sought to ensure that Reid "remained faithful" to CCNV's original "vision" of the work. 7/25 Tr. 22 (Snyder). CCNV also made certain significant changes in details proposed by Reid. CCNV rejected Reid's idea to place the family's belongings in "suitcases" or "shopping bags" and told him instead to use a shopping cart. 652 F. Supp. at 1455 & n.5 (App. 32a). CCNV also rejected Reid's proposal to have the mother seated on the steam grate with the infant in her lap and the father standing behind: CCNV directed that all figures be placed in a recumbent position, as they would normally be found taking advantage of the heat from the grate. 652 F. Supp. at 1455 & n.5 (App. 32a). As Lewis testified, "[t]he major decisions about the idea, the placement and the detail . . . were made by Mitch Snyder and CCNV." 2/2 Tr. 124 (Lewis); *see* 7/25 Tr. 12-13 (Snyder) ("We dictated to the artist what it was in detail, what we wanted to see created at each step of the way.").

Reid missed the December 12, 1985 deadline set by CCNV for the completion of the figures. Although upset by the fact that the statue was not completed in advance of the Pageant of Peace as the parties had agreed, Snyder nevertheless directed Reid to take the time necessary to ensure that "Third World America" would be a "first-class work." 652 F. Supp. at 1455 (App. 33a). Reid's portion of the statue was finally delivered to the Ellipse on December 24, 1985.

c. *Production Of The "Third World America" Steam Grate And Base*

CCNV determined at the outset that the family in "Third World America" should be enshrouded in steam. The objective was to recreate an "Inferno-like" scene similar to one that Snyder had encountered when he first viewed a homeless man taking advantage of the heat from a steam grate. 7/25 Tr. 11 (Snyder). The steam grate and steam effect constitute an interdependent part of "Third World America." *See* 846 F.2d at 1496 (App. 22a-23a); 7/25 Tr. 11, 15, 16 (Snyder); 2/2 Tr. 62 (Snyder); 2/2 Tr. 97 (Beck). As Snyder testified, the statue

> is a profoundly powerful image, but its power is in the totality of the image. I mean steam rising around those figures is what creates the final image that we want to see created. And the base, the statues, all of it is part of it. It goes together.

7/25 Tr. 33 (Snyder). The steam grate itself was intended by CCNV to symbolize the manger in the traditional creche because, Snyder testified, the steam grate is "one of the few places that [homeless] people can find heat without illegally occupying unoccupied buildings." 7/25 Tr. 7 (Snyder).

Although the figures in "Third World America" were produced by Reid, the steam grate and base (with the inscription "And Still There Is No Room At The Inn")

were produced by a third party, under CCNV's direction and without any reliance on Reid. 7/25 Tr. 15, 19 (Snyder); 2/2 Tr. 29, 54-55 (Snyder). The production of continuous steam flowing through the grate was also a complicated undertaking. in which Reid played no role. 2/3 Tr. 254 (Reid). CCNV paid approximately $7,000-$8,000 for the production of the steam grate and base and steam effect. 652 F. Supp. at 1455 (App. 33a).

d. *The Controversy Over "Third World America"*

CCNV and Reid never entered into any written agreement concerning "Third World America." Nor did they have any agreement, written or oral, concerning copyright ownership of that work. Reid nevertheless carved a copyright notice on the statue "to indicate his claim to a copyright," a claim which the District Court found to have been made by Reid "for the first time" when he delivered the completed figures to the Ellipse. 652 F. Supp. at 1455 & n.7 (App. 33a).

The dispute between the parties arose in March 1986 when Reid, who had possession of "Third World America" for purposes of making certain repairs, refused to return the work to CCNV. Reid announced that he intended to take the sculpture on his own exhibition tour, thereby precluding CCNV from going forward with its exhibition plans in order to raise money for the homeless. Reid expressed concern for the welfare of the statue, claiming that it could not withstand the rigors of CCNV's intended exhibition tour but would withstand his "more modest" tour. 652 F. Supp. at 1456 (App. 33a-34a). He also urged CCNV to cast the statue in bronze, a proposal which CCNV again rejected as too costly. CCNV indicated that it would agree to the bronzing if Reid would cover the cost. 652 F. Supp. at 1456 (App. 33a-34a). Reid never did so.

Reid also insisted, at that time, that he had the right to produce and to sell derivative works of "Third World

America." CCNV responded that, consistent with its representations to those artists who helped fund "Third World America" (*see* page 6, *supra*), CCNV "had no intention of allowing [Reid] to use that statue, which was created for and about homeless people, for his personal profit." 7/25 Tr. 27-28, 40 (Snyder).

2. Proceedings Below

a. *The District Court*

CCNV filed the present lawsuit in June 1986, seeking return of the sculpture and a declaration that it owns the copyright in it. Following a July 25, 1986 hearing on CCNV's motion for a preliminary injunction, the District Court ordered the return of the statue to CCNV. The District Court later conducted a two-day bench trial, during which testimony was presented by Snyder, Reid, Lewis and two CCNV members involved in the production of "Third World America" (Clifford Newman and Elizabeth Beck). In several respects, Reid's testimony conflicted with that of the other witnesses on the issue of creative control. Both sides, however, agreed that the issue of copyright ownership turned upon who possessed such control. *See* 2/6 Tr. 281-91 (Zinman).

The District Court resolved the principal factual conflicts in favor of CCNV, and entered a final judgment declaring that Snyder (as trustee for CCNV) owns the copyright in "Third World America" pursuant to the work for hire doctrine. In reaching its decision, the District Court focused upon CCNV's control over the creation of "Third World America." The District Court concluded that CCNV and its members were the "motivating factor in the procreation" of "Third World America"; that they "not only conceived the idea" underlying the work, but "did so in starkly specific detail"; and that,

> while much was undoubtedly left to [Reid's] discretion . . . CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced

> what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs.

652 F. Supp. at 1456 (App. 35a).

As the District Court also found, CCNV took the steps necessary to make certain that the statue would "convey the message they had intended for it." 652 F. Supp. at 1457 (App. 35a). The District Court rejected Reid's testimony that he had "reserved" copyright in the work and had retained "total [artistic] control" as being "without any corroboration" and "inconsistent with the tenor of the enterprise." 652 F. Supp. at 1454-55 n.3 (App. 31a). Based upon the record, the District Court determined that CCNV "had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's 'control,' even the artist's." 652 F. Supp. at 1455 n.3 (App. 31a).

b. *The Court Of Appeals*

On appeal, Reid emphasized that he was not challenging the District Court's findings of fact. *See* Brief for Appellant in Docket No. 87-7051 at 10 (D.C. Cir., filed November 20, 1987). Instead, Reid controverted the "control" standard which he had advanced before the District Court. *See* page 10, *supra*. According to Reid on appeal, the proper standard is the one articulated by the Fifth Circuit in *Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988) (*"Easter Seal"*), a case which was decided after the District Court below had entered judgment in the present case. The court in *Easter Seal* held that an artist is not an employee under the work for hire doctrine of the Copyright Act unless he or she is an employee under agency law, and that the existence of an employment relationship is determined by reference to the factors set forth in Restatement (Second) of Agency § 220 (1958) (reprinted at App. 37a).

The Court of Appeals below followed the *Easter Seal* approach and concluded that Reid was not CCNV's agency law employee because Reid had donated his services, worked in his own studio and personally chose his own assistants, and because the creation of sculptures was not CCNV's "regular business." 846 F.2d at 1494 n.11 (App. 19a). The Court of Appeals also expressly rejected the "supervision and control" standard set forth in *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) ("*Aldon*") and followed in *Evans Newton, Inc.* v. *Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 479 U.S. 949 (1986); *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); and various district court decisions. *See Easter Seal*, 815 F.2d at 333-34.[2] The Court of Appeals made clear, however, that:

> [C]onflict with *Aldon Accessories* is unavoidable. Had we determined that the "sufficiently supervised and directed" test framed in that case correctly construed the 1976 Act, we would have affirmed the district court's judgment declaring Mitch Snyder, as trustee for CCNV, exclusive owner of copyright in the sculptural work "Third World America."

846 F.2d at 1497 n.18 (App. 25a).

The Court of Appeals observed that on "the record as it now stands," "Third World America" may qualify as a "joint work," the copyright in which CCNV may share

[2] The court in *Aldon* upheld the following jury instruction:

> "A work for hire is a work prepared by what the law calls an employee working within the scope of his employment. What that means is, a person acting under the direction and supervision of the hiring author, at the hiring author's instance and expense. It does not matter whether the for-hire creator is an employee in the sense of having a regular job with the hiring author. What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation."

738 F.2d at 551.

with Reid or perhaps other parties. 846 F.2d at 1495-98 (App. 20a-26a). It remanded this case to the District Court for "comprehensive consideration" of the issues related to "joint works," 846 F.2d at 1499 (App. 28a), including whether the various "assistants" engaged by Reid were his "employees" under agency law principles. 846 F.2d at 1498 (App. 26a). If "Third World America" is considered a "joint work" and not a work for hire, CCNV would be unable to control the exploitation of that work; Reid (and any others who qualified as joint authors) would be permitted to make virtually any use they wished of the work (including the preparation of derivative works), without regard to the purposes for which it was created. *See* 846 F.2d at 1498-99 (App. 27a). Likewise, CCNV would be obligated to account to Reid and the other "authors" for any profits from "Third World America" which would otherwise go solely to providing for the homeless. *See* 846 F.2d at 1498 (App. 27a).

Neither CCNV nor Reid has sought review of the Court of Appeals remand order respecting joint works. The issue before this Court concerns the Court of Appeals ruling that the work for hire doctrine is inapplicable in the circumstances of this case. If the work for hire doctrine is applicable, as the District Court found, the questions related to joint works become moot.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Section 201(b) of the 1976 Act provides: "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all rights comprised in the copyright." 17 U.S.C. § 201(b). The term "work made for hire" is defined as

> 1) a work prepared by an employee within the scope of his or her employment; or

> 2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audio-visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101.[3]

CCNV does not claim that "Third World America" is a "specially ordered or commissioned" work or that it comes within subdivision (2) above. Rather, as the District Court correctly recognized, the issue here is whether CCNV established an "employment" relationship with Reid, within the meaning of subdivision (1), by virtue of its close and continuous supervision and control of Reid's efforts during the seven-week period that he worked full-time on the CCNV project; its payment of Reid's expenses (including the maintenance of his studio, the purchase of materials and the hiring of assistants) during this period; and Reid's provision of services to CCNV in order to implement CCNV's specific objectives, in response to deadlines imposed by CCNV, and in return for identification with a well-publicized work to benefit the homeless.

2. The District Court held, and the Court of Appeals correctly acknowledged, that CCNV and Reid had a copyright employment relationship under the Second Circuit supervision and control standard. That standard

[3] The classification of a work as a "work for hire" has a number of important consequences under the Copyright Act, in addition to determining the author and thus copyright owner of the work. Works for hire are excluded from Sections 203(a) and 304(c) of the Act, 17 U.S.C. §§ 203(a) and 304(c), which permit authors unilaterally to terminate copyright assignments after a period of 35 years. Copyright normally endures for the life of the author plus 50 years; copyright in a work for hire, however, lasts for 75 years from publication or 100 years from creation, whichever is shorter. 17 U.S.C. §§ 302(a) & (c).

had been applied consistently by the courts under the 1909 Copyright Act. And there is absolutely nothing in the 1976 Act or its legislative history which evidences any Congressional intent to repudiate that standard. To the contrary, the supervision and control standard is fully consistent with the terms, purposes and history of the 1976 Act.

It was recognized from the outset of the copyright revision process that the very distinction between "employee works" and "commissioned works" lies in the supervision and control which is generally exercised by an employer. Furthermore, subdivision (1) of the work for hire definition, which contains the employee provision, was essentially non-controversial. It was intended to codify the "long established" principle that the employer owns the copyright in a work created by an employee within the scope of employment, and to leave existing law intact.

The work for hire controversy instead centered on identifying the circumstances under which commissioned works would come within subdivision (2). This controversy was resolved when the House Judiciary Committee adopted a compromise agreement among certain of the interested parties. The agreement identified those commissioned works which might qualify as works for hire under subdivision (2), but made no mention whatsoever of subdivision (1). Clearly, Congress intended to distinguish *among* the categories of commissioned works which may qualify as works for hire. By doing so, however, Congress did not intend to change the recognized judicial standard for distinguishing *between* commissioned works, on the one hand, and employee works, on the other hand. The Court of Appeals has simply read too much into Congress' adoption of subdivision (2).

The supervision and control standard is also deeply ingrained in the very purposes of copyright. Where, as here, the employer not only conceives of a particular work but does so in "starkly specific detail" and then directs and finances the implementation of that concept to satisfy the employer's objectives, the employer's actions are those

which the copyright reward is intended to stimulate. Furthermore, the supervision and control standard avoids the severe practical difficulties which necessarily flow from fractionalization of copyright. Indeed, because the Court of Appeals below has discarded the supervision and control standard, it has recognized that the dozen or so assistants who worked under Reid's (and ultimately CCNV's) supervision and control may all qualify as joint authors of "Third World America" (with a duty of accounting to each other).

3. The Court of Appeals' adoption of a common law agency test to determine copyright employment status is inconsistent with both the thrust of Section 301(a) of the Copyright Act, 17 U.S.C. § 301(a), (preempting common law rights that are equivalent to copyright), and with the logic of *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) (term "employee" in federal statutes should not be defined simply by reference to common law agency principles). Moreover, there is no indication whatsoever in the legislative history of the 1976 Act that Congress ever considered replacing the existing judicial approach with one that focused exclusively upon agency law. Unlike the supervision and control standard, the Restatement of Agency factors were developed for purposes having nothing to do with copyright policy.

If, however, the agency law approach is adopted, at the very least this case should have been remanded to the District Court below on the work for hire issue (as it was on the joint work issue). *See Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974). The existence of an agency law relationship is an issue to be resolved by the trier of fact. The District Court, which conducted a two-day bench trial in this case, has never had the opportunity to consider the facts in light of the agency law standard; indeed, both CCNV and Reid had advanced the Second Circuit control standard before the District Court. The Restatement also establishes a control test, which some courts have found to be satisfied in circumstances less compelling than here.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT, IN THE CIRCUMSTANCES OF THIS CASE, CCNV AND REID ENTERED INTO A COPYRIGHT EMPLOYMENT RELATIONSHIP FOR PURPOSES OF PRODUCING "THIRD WORLD AMERICA"

In construing the 1976 Act, "it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'" *Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985) ("*Mills Music*") (citations omitted). The "ordinary meaning" of the term "employee" is plainly consistent with the Second Circuit *Aldon* standard, and is broad enough to encompass the relationship between CCNV and Reid.[4]

The Court, however, also has stated that: "Where the term 'employee' has been used in statutes without particularized definition it has not been treated by the courts as a word of definite content." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 546 n.29 (1940) (citations omitted). In *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) ("*Hearst*"), the Court rejected the argument that the term "employee," in the National Labor Relations Act ("NLRA"), may be defined simply by reference to the common law of agency. The Court explained that there is no "simple, uniform and easily applicable test" of employment under federal statutes.

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[4] *See Black's Law Dictionary* 471 (5th ed. 1979) ("employee" is a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"); *Webster's New World Dictionary of the American Language* 459, 1596 (2d ed. 1976) ("employee" is "a person hired by another, or by a business firm, etc., to work for wages or salary"; "wage" is "money paid to an employee for work done, and usually figured on an hourly, daily, or piecework basis" or "what is given in return; recompense").

322 U.S. at 120. Mr. Justice Rutledge, speaking for the Court in *Hearst*, explained that the question of who is an "employee" for purposes of a particular federal law

> *must be answered primarily from the history, terms and purposes of the legislation.* The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings. . . [in] the statute where it appears," . . . and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

322 U.S. at 124 (citations omitted) (emphasis added); *accord United States* v. *Silk*, 331 U.S. 704, 713 (1947).[5]

Application of the *Hearst* approach to the facts of this case makes clear, as the District Court found, that CCNV and Reid had an employment relationship within the meaning of the 1976 Act's work for hire provisions.

A. The District Court's Finding Of An Employment Relationship In The Circumstances Of This Case Is Consistent With The History, Terms And Purposes Of The 1976 Copyright Act

At the time that Congress enacted the revision of the copyright law in 1976, the courts had a settled approach to determining whether an employment relationship exists under the work for hire doctrine of the 1909 Copyright Act.[6] The "hallmark of 'an employment for hire'

[5] Congress specifically amended the NLRA to overrule the holding in *Hearst*, by providing that "general agency principles could not be ignored in distinguishing 'employees' from independent contractors." *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). The general approach to defining employment relationships, as set forth in *Hearst* and quoted above, was not affected by such Congressional action. *See* 404 U.S. at 168; *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891-92 (1984).

[6] Section 26 of the 1909 Act, 17 U.S.C. § 26 (1970), which effectively codified the Court's decision in *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239 (1903), provided that the "word 'author' shall include an employer in the case of works made for hire." *See also* 17 U.S.C. § 24 (1970) (affording renewal rights to the "employer for whom such work is made for hire"). During consideration of the bills which led to the 1909 Act, at least one party suggested that the terms in the work for hire provisions were vague and should be more carefully defined. 5 Legislative History of the 1909 Copyright Act M55 (Brylawski & Goldman eds. 1976). Congress, however, chose not to do so.

relationship" under that Act was whether the hiring party "could have exercised the requisite power to control or supervise [the artist's] work." *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976) (citations omitted). As the Second Circuit noted in *Scherr* v. *Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) ("*Scherr*"), the "essential factor" is

> *whether the employer possessed the right to direct and to supervise the manner in which the work was being performed.* . . . Other pertinent, but non-essential, considerations, are those indicating at whose insistence, expense, time and facilities the work was created. . . . Additionally, the nature and amount of compensation or the absence of any payment received by the employee for his work may be considered; but when compared with the above factors it is of minor relevance. See Nimmer, *supra* at § 62.2.

Scherr, 417 F.2d at 500 (citations omitted) (emphasis added).[7]

[7] The test has been phrased by the courts, including the District Court below, in terms of a "right to control," thereby implying that the actual exercise of that right is not necessary to establish an employment relationship. *See Murray* v. *Gelderman*, 566 F.2d 1307, 1310-11 (5th Cir. 1978). As a practical matter, however, it is difficult to demonstrate the existence of a right to control in a litigation context without evidence of the actual exercise of that right—particularly since the control issue typically arises, as in the present case, where there is no written agreement which specifies each party's rights.

The Second Circuit in *Aldon* concluded that the same approach is to be followed in determining the existence of an employment relationship for purposes of the 1976 Act. Under this approach, as the District Court held and the Court of Appeals acknowledged, CCNV and Reid had a copyright employment relationship. 846 F.2d at 1497 n.18 (App. 25a); 652 F. Supp. at 1455-56 (App. 34a-36a).

Nowhere in the 1976 Act or in the Act's legislative history does Congress state that it intended to jettison the control standard or otherwise to reject the pre-Act judicial approach to identifying a work for hire employment relationship. *Aldon*, 738 F.2d at 552. Nevertheless, the Court of Appeals below concluded that "Congress intended to '*radically* revise' work for hire doctrine" and to overrule the pre-Act work for hire case law. 846 F.2d at 1494 (App. 18a), *quoting Easter Seal*, 815 F.2d at 330 (emphasis in original). The Court of Appeals based this conclusion on the fact that Congress provided separate treatment in the 1976 Act work for hire provisions for "commissioned works." 846 F.2d at 1494 (App. 18a).

To be sure, portions of the 1976 Act constitute a significant revision of many aspects of the 1909 Act. However, when it came to the work for hire doctrine, Congress adopted what it considered to be a "basic" and "well established" principle of existing copyright law: "that in the case of works made for hire the employer is considered the author of the work" in the absence of a contrary agreement. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5736-37 ("1976 House Report"). The position of the Court of Appeals—that Congress in the 1976 Act maintained the "well established" work for hire doctrine but nevertheless "radically revised" well established judicial precedent defining the scope of that doctrine—is simply wrong.

1. *The 1976 Act's Distinction Between "Employee" Works And "Specially Ordered Or Commissioned" Works Is Based On Considerations Of Supervision And Control, Such As That Exercised By CCNV In This Case*

The genesis of the 1976 Act's work for hire provisions is found in a 1958 study prepared for Congress by Borge Varmer, on behalf of the Copyright Office. *Cf. Mills Music*, 469 U.S. at 159. Varmer distinguished between "employee" works, on the one hand, and "specially commissioned" works prepared by "independent contractors," on the other hand. According to Varmer, only employee works were regarded as works for hire under the 1909 Act, while commissioned works were not. Varmer explained the basis for this distinction as follows:

> [T]he common law generally has differentiated between the employer-employee relationship and that of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission. *Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.* Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire, and the corresponding provisions in the copyright laws of several foreign countries, have not been extended to commissioned works generally.

B. Varmer, *Works Made for Hire and on Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. 142 (Comm. Print 1960) (emphasis added) ("Varmer 1958 Study").

The Varmer Study was followed by the Register of Copyright's 1961 Report to Congress on the issues to be

addressed in copyright revision legislation. *Cf. Mills Music*, 469 U.S. at 159. The Register noted that the "rule has long been established, both under the common law and under the [1909 Act], that the rights in a work produced by an employee in the course of his employment are vested in the employer." According to the Register, this rule is based upon several grounds, including that the "*work is produced on behalf of the employer and under his direction.*" Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess. 85 (Comm. Print 1961) ("Register's 1961 Report") (emphasis added).[8]

Neither the Varmer 1958 Study nor the Register's 1961 Report was considered in the Court of Appeals' opinion below, or in the *Easter Seal* opinion. As the reports suggest, however, the District Court's focus on CCNV's creative control and supervision is rooted not only in pre-1976 Act case law—but also in the very underpinnings of the work for hire doctrine and in the 1976 Act's distinction between "employee" works and "specially ordered or commissioned" works. *See also* Cambridge Research Institute, *Omnibus Copyright Revision: Comparative Analysis of the Issues* 102 (1973) (distinction between employee works and commissioned works in copyright revision legislation is "based on the belief that more direction and control can presumably be exercised over the efforts of his employee, than can be exercised over an independent contractor"). The focus on supervision and control also finds support in the policies underlying copyright generally.

[8] The other "grounds" noted by the Register were that the "employee is paid for the work" and the "employer, since he pays all the costs and bears all the risks of loss, should reap any gain." Register's 1961 Report at 85. In the present case, CCNV paid Reid $15,000 to cover the costs of producing "Third World America." Although Reid agreed to donate his services to CCNV, he received the compensation that he bargained for in terms of reimbursement of costs, widespread exposure of his work, and identification with a worthwhile cause. *See* 652 F. Supp. at 1457 (App. 36a).

Article I, Section 8 of the Constitution authorizes Congress to extend copyright protection to "Authors." This term has been construed broadly to mean "an 'originator,' 'he to whom anything owes its origin.'" *Goldstein* v. *California*, 412 U.S. 546, 561 (1973), *quoting Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 58 (1884). Where, as here, the employer not only "originates" the concept of a work but does so in "starkly specific detail" and then supervises, controls and pays for the implementation of that concept to ensure that the work is what he intends, the employer is properly regarded as the author who deserves the copyright reward. As Judge Friendly has observed:

> It is often said . . . that the essential factor in applying the "work for hire" doctrine is "whether the employer possessed the right to direct and to supervise the manner in which the work was being performed." See Nimmer, Copyright § 62.2. *Where the employer in fact tells the employee pretty much what to do, vesting copyright in the former is wholly consistent with the policy of the Copyright Act since the creativity can be said to be primarily the employer's and the employee has simply carried out his instructions.*

Scherr, 417 F.2d at 502 (dissenting opinion) (emphasis added).

The copyright reward, of course, "is intended to motivate the creative activity of authors." *Sony Corp* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). That reward is necessary to motivate an artist to undertake, on "speculation" and at his or her own economic risk, the production of an original work of art without the benefit of another's creative and financial support. Here, however, the artist's efforts have been procured, subsidized and closely supervised by CCNV members who, with the devotion of significant time and expense on their part, conceived and shaped the work in the manner which they, not Reid, wanted and in order to convey the message

which they, not Reid, intended. Reid has simply used his skills to implement the creative direction of the CCNV members, in the same way that Reid's dozen assistants used their skills to implement Reid's instructions. Under such circumstances, the policies underlying the work for hire doctrine and copyright, as the Varmer 1958 Study and the Register's 1961 Report recognize, generally contemplate that CCNV should receive the copyright reward.[9]

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[9] The District Court found that CCNV was the "motivating factor" behind "Third World America." 652 F. Supp. at 1456 (App. 35a). "[T]he philosophical justification for the 'work made for hire' exception is that the employer can actually be considered a kind of author; 'the motivating factor in producing the work was the employer who induced the creation.'" B. Ringer, *Renewal of Copyright*, Copyright Office Study No. 31, 86th Cong., 2d Sess. 140 n.245 (Comm. Print 1960) ("Ringer 1960 Study"), *quoting* Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 Colum. L. Rev. 712, 716 (1944). Ringer notes that the force of this reasoning is somewhat "diminished" by one decision holding that "the employer need contribute nothing but money . . . ." *Id.*

Youngdahl, *Copyright Law and the Employment Relation*, 5 St. Louis U.L.J. 510, 529 (1959), *quoting* H. Howell, *The Copyright Law* 51 (1948), notes that the work for hire doctrine is "based on the consideration that the employer was the proximate cause of the work coming into existence, and therefore is to be deemed as contributing to the progress of science and the useful arts and subrogate to all rights of the real author."

See also Comment, *Literary Property and Contracts of Hire*, 5 DePaul L. Rev. 256, 257 (1956) (The drafters of the 1909 Act "saw the employee as being a tool in the hand of the employer, and that in actuality the employer was the real author in law. So, when the [1909] act speaks of the employer as being the author, it contemplates a contract of hire whereby the employer is to exercise some degree of control over the actions of the employee").

2. *Congress' Determination To Provide Separate Treatment For Commissioned Works In The 1976 Act Was Never Intended To Alter The Approach By Which The Pre-Act Courts Had Applied A Supervision And Control Standard To Determine The Existence Of An Employment Relationship*

The Varmer 1958 Study and Register's 1961 Report were followed by considerable debate over work for hire and related issues. *Cf. Mills Music*, 469 U.S. at 159-60. Artist organizations, on the one hand, and motion picture and publishing interests, on the other hand, advanced opposing views on a variety of such issues, including whether the work for hire doctrine should be retained; whether the employer should be considered the author or merely the copyright owner; whether works for hire should be included in the controversial termination provisions; whether the employer's rights should be limited as they are in the patent area under the "shop right doctrine"; whether commissioned works should qualify as works for hire and, if so, which commissioned works should so qualify and under what circumstances. There is absolutely no suggestion in the history of these debates that Congress intended to alter the settled judicial approach to defining a copyright employment relationship. To the contrary, this history confirms that Congress retained the supervision and control standard as the basis for distinguishing between "employee works" and "specially ordered or commissioned works."

First, the Register's 1961 Report at 87 recommended that Congress define "work made for hire" as a "work created by an employee within the regular scope of his employment." This definition, the Register suggested, would not include "works made on special commission." *Id.* at 86. Accordingly, in 1963, the Register presented a draft bill in which he suggested that Congress define a "work made for hire" as a "work prepared by an employee within the scope of the duties of his employment

but not including a work made on special order or commission." Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Draft, 88th Cong., 2d Sess. 15 n.11 (Comm. Print 1964) ("1963 Preliminary Draft and Comments"). The Register did not define the terms "employee" or "special order or commission." However, as Barbara Ringer, who later became the Register of Copyrights, specifically noted during the discussions on the Register's 1961 Report:

> [W]ith respect to works made for hire, I think *the report in essence recommends that the present law be retained.* Under the present law, as you are very well aware, the employer has the right to secure copyright. The report recommends a somewhat more specific definition of what is a "work made for hire," but other than that would *leave the present law undisturbed.*

Discussion and Comments on Report of the Register of Copyrights, 88th Cong., 1st Sess. 144 (Comm. Print 1963) (emphasis added).

The state of the then "present law" on work for hire under the 1909 Act was set forth by Professor Melville Nimmer in the 1963 edition of his classic treatise on copyright law. Nimmer wrote, in essentially the same language that appears in the current edition of his treatise:

> The question then arises as to what constitutes an employment for hire. The nature of the compensation paid to the alleged employee is not necessarily determinative. Thus one may be an employee regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if the writing is done as an accommodation with no compensation at all. *The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work.*

Nimmer on Copyright § 62.2 (1963) (citations omitted) (emphasis added); *accord* 1 *Nimmer on Copyright* § 5.03 [B][1][a] at 5-12 to 5-13 (1988). The same view was advanced by at least one attorney who participated in the 1963 discussions of the Register's draft legislation: "The cases do hold that 'employment for hire' exists where there is a relationship of 'master and servant,' that is, where the person receives compensation and *is subject to control and regulation by the person for whom he performs the work.*" 1963 Preliminary Draft and Comments at 274 (remarks of Samuel Tannenbaum) (emphasis added). *See also* note 9 *supra.*[10]

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[10] Noting that cases which had arisen under the 1909 Act "involved salaried employees," Varmer wrote: "[I]t may be concluded that Section 26 [of the 1909 Act] refers only to works made by salaried employees in the regular course of their employment." Varmer 1958 Study at 130. None of the cases cited by Varmer, however, considered the question of whether an employment relationship exists where the artist is subject to supervision and control but does not receive a "salary." As noted above, Varmer proceeded to observe that it is supervision and control which determines the existence of an employment relationship. Varmer 1958 Study at 142.

In a companion Copyright Office study released two years after the Varmer 1958 Study, it was also noted that: "A regular salary is usually indicative of employment for hire. However, whether or not a work was 'made for hire' is not necessarily dependent upon whether it was prepared by an employee exclusively during regular working hours, or for a fixed salary." Ringer 1960 Study at 141 (citations omitted).

None of the reports of the Register of Copyrights or the Congressional committees made in connection with the 1976 Act ever mentioned Varmer's reference to salaried employees. The Register's 1961 Report implicitly recognizes that the class of copyright employees is much broader than simply salaried employees. *See* Register's 1961 Report at 86 (noting the "great variety of situations involved —in which the employment relations . . . differ widely").

See also B. Ringer & P. Gitlin, *Copyrights* 28 (1963) ("'For hire' in this context [*i.e.*, the 1909 Act] has been held to mean something broader than 'for salary' and narrower than 'on commission'") (citations omitted).

Second, the Register's recommendation to define "works made for hire" as "works prepared by an employee within the scope of the duties of his employment" was essentially non-controversial, and ultimately was incorporated into Section 101 of the 1976 Act without significant change. The controversy instead centered on the "commissioned works" portion of the Register's recommendation. The House Report notes that:

> The status of works prepared on special order or commission was a major issue in the development of the definition of 'works made for hire' in section 101, which has undergone extensive revision during the legislative process. *The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as 'works made for hire,' and those that should not.*

1976 House Report at 121 (emphasis added). While Congress, the Copyright Office and affected parties debated the issue of where to draw the line between qualifying and nonqualifying commissioned works, absolutely no issue was raised as to the basis for distinguishing between "employee works," on the one hand, and "commissioned works," on the other hand. No one challenged the supervision and control standard as a basis for making that distinction.

The commissioned works controversy was effectively resolved in 1965 when eight interested groups representing book publishers, music publishers and artists) entered into a compromise agreement covering a range of copyright issues. This agreement provided that the works typically commissioned by book publishers and music publishers would qualify as "specially ordered or commissioned works" and thus as "works for hire" (provided there was a written agreement to that effect). *See* Hearings on H.R. 4347 before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965). This compromise agreement does not even mention "employee works," let alone suggest any new basis

for distinguishing between "employee works" and "specially ordered or commissioned works."

A House Judiciary Committee report accompanying one of the earlier copyright revision bills notes that: "After full consideration the committee decided to incorporate the substance and much of the language of this compromise in the bill." H.R. Rep. No. 83, 90th Cong., 1st Sess. 87 (1967). That portion of the compromise agreement dealing with works for hire was ultimately incorporated into subdivision (2) of the work for hire definition in the 1976 Act. Again, however, there is no suggestion in the committee reports or elsewhere that, by adopting a separate provision on "specially ordered or commissioned works," Congress intended to alter the standards for defining "employee works." [11]

Third, at the time of the compromise agreement the courts had "generally" not considered commissioned works to be works for hire under the 1909 Act. *See* 1961 Register's Report at 86. However, a line of cases had developed in which the courts applied a presumption that an independent contractor assigned his or her copyright to the hiring party. *See, e.g., Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). These cases culminated with *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966), where the court held (one year after the compromise agreement) that it saw no reason why commissioned works should not come within the 1909 Act's work for hire doctrine; thus, in the absence of an agreement to the contrary, it would be presumed that an independent contractor was an employee for hire. As the Court in *Aldon* observed, this "presump-

[11] "[U]nlike a work prepared within the scope of employment . . . a commissioned relationship [for purposes of subdivision 2] may exist even if the commissioning party does not have the power to direct and supervise the manner in which the work is performed." 1 *Nimmer on Copyright* § 5.03[B][2][d] at 5-26 n.85 (1988).

tion applied to all works prepared by an independent contractor, regardless of the presence or absence of direction and ~~supervision~~ by the hiring party." 738 F.2d at 552.

Congress did not explain the effect of the 1976 Act on the *Brattleboro* line of cases. The court in *Aldon* has suggested that subdivision (2) of the work for hire definition changes the treatment accorded commissioned works. Petitioners agree that where the requisite supervision and control are lacking, a work for hire may be found only under subdivision (2). However, the 1976 Act does *not*, either explicitly or implicitly, repudiate the long-established supervision and control standard as the basis for distinguishing between "employee works" and "specially ordered or commissioned" works. *Aldon*, 738 F.2d at 552.

B. The District Court's Finding Of An Employment Relationship In The Circumstances Of This Case Is The Product Of A Fair And Reasonable Approach Which Best Effectuates The Constitution's Objectives For Copyright

1. *The Focus On Supervision And Control Avoids The Problems Inherent In Fractionalization Of Copyright*

Implicit in the analysis of the District Court below is the sound principle that only one party—the one who exercises creative control and supervision—is the copyright owner of the resulting work. Ignoring the significance of supervision and control in the copyright context, as the Court of Appeals has done, leads to a contrary and ill-advised result. Under the Court of Appeals' analysis, many or all of the parties who are subject to another's control in the production of a work may nevertheless qualify as joint copyright owners of that work (all with a duty to account to each other for any revenues earned from the work). 846 F.2d at 1498 (App. 27a). Indeed, finding the work for hire doctrine inapplicable, the Court of Appeals has remanded this case for a determination

of whether Reid's twelve or so "assistants" and others are joint owners of the copyright in "Third World America." 846 F.2d at 1499 (App. 28a). As the Court of Appeals recognized, the standard for determining whether a creative contribution qualifies for joint authorship is "not high"; the contribution is not required to be copyrightable itself. 846 F.2d at 1496 (App. 23a), *citing* 1 *Nimmer on Copyright* § 6.03 at 6-6 and § 6.17 at 6-18 (1988).

The approach of the Court of Appeals in the present case—to invoke the joint work doctrine as an alternative to work for hire—implicitly recognizes that CCNV deserves to be an author and thus copyright owner of "Third World America"; if CCNV were not, it could be held liable for infringing the very work which it conceived, nurtured, directed and paid for. The Court of Appeals, however, attempts to avoid such an inequitable result by blurring what should be a fundamental distinction between a work for hire and a joint work. A joint work is the product of the joint efforts of two or more parties, none of whom is subject to the control of his or her creative partner(s). Here, Reid was subject to CCNV's control, just as Reid's assistants were subject to his and CCNV's control (and thus, in CCNV's view, ineligible for author status). Fractionalization of the copyright is simply not a proper or viable alternative to the work for hire doctrine in those cases where the artist has ceded creative control to the employer.[12]

CCNV has expended a considerable amount of creative and financial resources to develop what was intended to

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[12] The Court of Appeals' ruling on joint works is not before the Court. *See* page 13, *supra*. If the judgment of the Court of Appeals is affirmed, CCNV will press its argument before the District Court on remand that, at the very least, it is a joint author of "Third World America." The point here is that by discarding the supervision and control standard, the Court of Appeals has necessarily invited the significant problems that flow from fractionalization of copyright.

be the symbol with which it and its cause would be identified. Under the Court of Appeals' analysis, however, Reid, all of Reid's assistants and others may have rights in the symbol which they were paid by CCNV to produce; and CCNV may obtain exclusive rights to that symbol only by successfully negotiating with all of those parties. Imposing such a burden upon the employing party to identify and to negotiate with all of the contributors to a work—even though they were supervised and paid by the employing party—is counterproductive to sound copyright policy and could not have been intended by Congress. *See* 1961 Register's Report at 86 (rejecting artists' proposal to apply "shop right" doctrine to works for hire on ground that, *inter alia*, the "proposal would be unworkable in the common situation where a work is the composite product of many employees").[13]

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[13] The Court of Appeals expressed a concern with ensuring predictability and certainty as to the identity of copyright owners of a particular work. 846 F.2d at 1494 (App. 18a). It is unlikely that Congress, which chose to use the unadorned term "employee" in the face of repeated judicial pronouncements about the imprecision of that term, intended a precise definition. Furthermore, the adoption of the Restatement agency law approach does not provide any greater certainty than the *Aldon* control test. *See Hearst*, 322 U.S. at 121. In fact, by permitting multiple parties to claim copyright in a single work, without regard to whether their efforts were controlled by another, the Court of Appeals has adopted an approach which will cause significant uncertainty as to the identity of the copyright owners of a work. Even if the hiring party has the foresight to negotiate a copyright assignment from the party with whom it deals, it will not have any protection against other (often unknown) parties who may have dealt with that party and made the minimal contribution necessary for joint authorship status under the Court of Appeals' approach. *See* 1961 Register's Report at 86 (rejecting artists' proposal to apply "shop right" doctrine to works for hire on grounds that, *inter alia*, it "would often be difficult for potential users to know whom to deal with").

2. *The Focus On Supervision And Control Is Fair To Both Employers And Artists*

The Court of Appeals attempted to support its analysis on the basis of Congress' "general concern that creators receive fair recompense." *See* 846 F.2d at 1494 (App. 18a). But the work for hire provisions of the 1976 Act represent a "carefully balanced compromise," 1976 House Report at 121, in which Congress clearly manifested a concern for those who employ artists. Various proposals that would have expanded artists' rights at the expense of employers were squarely rejected. *See* Petition for Writ of Certiorari at 20-21; page 25 *supra*. On the other hand, the artists' positions on certain issues, such as limiting the categories of works in subdivision (2), were accepted. Thus, it is wrong to construe the work for hire provisions in a way that is designed to arbitrarily favor artists over employers—or vice versa.

Focusing upon all the circumstances surrounding the parties' relationship with particular regard to supervision and control, as the District Court below and the Second Circuit in *Aldon* did, reflects a fair, balanced and flexible approach—an approach which does not inherently favor any one class (employers or artists) over the other. Artists have claimed that some degree of supervision and control is always present in the relationship between an employer and an artist; thus, they contend, the control test will restrict their rights. But this claim is belied by the judicial history of the work for hire doctrine. Indeed, in several pre- and post-1976 Act cases the courts have found that the hiring party did *not* exercise sufficient supervision and control to gain the status of "employer" under the Copyright Act.[14] While that is cer-

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[14] In the following cases the courts concluded that no employment relationship existed because the requisite supervision and control were not present: *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987); *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737 (2d Cir. 1975), *cert. denied*,

tainly not the situation here, it has been, and surely will be, in other cases.

3. *The Focus On Supervision And Control Promotes Broad Public Availability Of Creative Works*

Any construction of the work for hire provisions must also take account of Section 105 of the Copyright Act, 17 U.S.C. § 105. Section 105 provides that: "Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." Section 101 defines a "work of the United States Government," in language comparable to that found in the work for hire provision, as "*a work prepared by an officer or employee* of the United States Government as part of that person's official duties." 17 U.S.C. § 101 (emphasis added). Congress made clear that: "Although the wording of the definition of 'work of the United States Government' differs somewhat from that of the definition of 'work made for hire,' the concepts are intended to be construed in the same way." 1976 House Report at 58. Consequently, the approach adopted by the Court in this case will likely determine the extent to which works are made available to the public under Section 105 of the Copyright Act.

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424 U.S. 955 (1976); *Donaldson Publishing Co.* v. *Bregman, Vocco & Conn, Inc.*, 375 F.2d 639 (2d Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *Sandwiches, Inc.* v. *Wendy's Int'l, Inc.*, 654 F. Supp. 1066 (E.D. Wisc.), *appeal dismissed*, 822 F.2d 707 (7th Cir. 1987); *Hudson* v. *Good Rush Messenger Services, Inc.*, Copyright L. Rep. (CCH) ¶ 26,089 (S.D.N.Y. 1987); *Joseph J. Legat Architects, P.C.* v. *United States Dev. Corp.*, 625 F. Supp. 293 (N.D. Ill. 1985); *Sygma Photo News, Inc.* v. *Globe Int'l, Inc.*, 616 F. Supp. 1153 (S.D.N.Y. 1985); *Olympia Press* v. *Lancer Books, Inc.*, 267 F. Supp. 920 (S.D.N.Y. 1967). The district court in *Easter Seal* also found that the hiring party failed to meet the *Aldon* control standard. *See* note 17 *infra*.

"The effect of Section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain." 1976 House Report at 59; *see also Public Affairs Associates, Inc.* v. *Rickover*, 284 F.2d 262, 268 (D.C. Cir. 1960), *vacated on other grounds*, 369 U.S. 111 (1962) (provision in 1909 Act comparable to Section 105 of the 1976 Act "is designed to achieve in a democracy that depends upon accurate public knowledge the broadest publicity for matters of government"). This purpose is consistent with the public welfare objective of the Constitution's copyright clause.[15] It would surely be defeated by an overly restrictive interpretation of the term "employee" in the work for hire provisions. Where Government personnel (at taxpayers' expense) supervise and control the production of a work by a private party (as CCNV supervised and controlled Reid's efforts), that work should be treated as a "work of the United States Government"—and, in accordance with Section 105 of the Act, it should be made broadly available to the public.

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[15] The overriding constitutional objective of copyright law is to encourage the widest possible availability of creative works to the public. As the Court indicated in *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), "ambiguities in the law of copyright" must be resolved with reference to the principle of serving the "general public good." "'Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.'" *Id.* at 431-32, *quoting Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). In the present case, CCNV has the greatest incentive and is in the best position to maximize the broad public availability of "Third World America." Indeed, CCNV had the work produced for precisely that purpose. *See* pages 4-5 *supra*.

II. EVEN IF COPYRIGHT EMPLOYMENT IS DETERMINED BY REFERENCE TO AGENCY LAW, THE COURT OF APPEALS ERRED IN FAILING TO REMAND THIS CASE TO THE DISTRICT COURT ON THE WORK FOR HIRE ISSUE

Virtually the entire work for hire section of the Court of Appeals' opinion below is devoted to a discussion of the conflicting judicial approaches. At the end of its discussion, the Court of Appeals adopts the agency law approach and, citing certain of the Restatement (Second) of Agency ("Restatement") § 220 (1958) factors, summarily concludes that: "Reid was an independent contractor and not an employee of CCNV within the rules of agency law." 846 F.2d at 1494 & n.11 (App. 19a). On this basis, the Court of Appeals reversed the District Court's finding of an employment relationship.

The question of whether an agency law employment relationship exists, however, is a question for the trier of fact. *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964); *Ward* v. *Atlantic Coast Line R.R. Co.*, 362 U.S. 396, 400 (1960); *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227, 228 (1959); *Bernstein* v. *Universal Pictures Inc.*, 517 F.2d 976, 980 (2d Cir. 1975). At the very least, therefore, the Court of Appeals should have remanded this case to the District Court for a consideration of the facts in light of the newly announced agency law standard (as it did on the joint work issue). Such a procedure is particularly warranted in this case because both CCNV and Reid had espoused the *Aldon* standard before the District Court. *See* page 10 *supra*. Thus, the District Court, which conducted a two-day bench trial, has never had the opportunity to consider whether an employment relationship existed under agency law principles.

The situation here is analogous to that in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974) ("*Kelley*"). The court of appeals in *Kelley* concluded that the district court had applied an erroneous legal standard for purposes of determining the existence of an employment relationship under the Federal Employees Liability Act. The Supreme Court agreed with the court of appeals' new standard, but remanded so as to "require the trier of fact to re-examine the record in light of the proper legal standard." 419 U.S. at 332; *see Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 & n.22 (1982) ("*Pullman*"); *Mandel* v. *Bradley*, 432 U.S. 173, 178-79 (1977); *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966). To be sure, a remand is not necessary where the "record permits only one resolution of the factual issue." *Pullman*, 456 U.S. at 292. But plainly this is not a case where the "only resolution" of the issue is a finding that CCNV and Reid did not have an agency law employment relationship. Indeed, if anything, the contrary is true.

First, although not mentioned by the Court of Appeals, the Restatement adopts "control" as the relevant standard for determining the existence of an employment relationship. Subsection (1) of Section 220 of the Restatement specifically provides: "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is *subject to the other's control or right to control*." (Emphasis added). The Court of Appeals offered no explanation as to the nature of the differences which it apparently perceived between the *Aldon* control standard—which it found to be satisfied in the circumstances of this case (846 F.2d at 1497 n.18 (App. 25a))—and the Restatement control standard.[16]

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[16] The Second Circuit in *Aldon* did not specifically refer to the Restatement control standard. However, the court did state that "it is necessary to look at the general law of agency as applied by prior copyright cases in applying subdivision (1) under the new [Copyright] Act." *Aldon*, 738 F.2d at 552. 1 *Nimmer on Copyright* § 5.03[B][1][a] at 5-13 to 5-15 & n.25.3 (1988) indicates that the *Aldon* supervision and control test is "merely a *particular application* of the general agency doctrine relating to master and servant." (Emphasis added).

The District Court below did note that the "employment relationship giving rise to a copyright is somewhat more expansive than the master-servant relationship found in the common law of agency." 652 F. Supp. at 1456 (App. 35a). However, given the record below and the findings of the District Court, it cannot properly be said—as a matter of law—that Reid and CCNV failed to establish an agency law employment relationship.[17]

Second, in reaching its agency law conclusion, the Court of Appeals elevated some of the several factors which are set forth in the second subsection of Section 220 of the Restatement to be the standards themselves—rather than examples of factors which may be useful in determining whether the control standard has been met. According to the Court of Appeals, a consideration of these factors demonstrates that Reid was not an agency law employee of CCNV. *See* 846 F.2d at 1494 n.11 (App. 19a). But the factors in Section 220(2)

> *are merely evidentiary indicia of the right to control.* Where, as here, there is ample independent evidence that the employer has the right to control the actual details of the writers' work and that it exercises this right, the fact that, for example, the employee is paid by the job rather than by the hour appears to be of minute consequence.

Tieberg v. *Unemployment Insurance Appeals Board*, 88 Cal. Rptr. 175, 471 P.2d 975, 982 (Cal. S.Ct. 1970) (en banc) ("*Tieberg*") (emphasis added).[18] *See also Ma-*

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[17] The situation here is quite different than that in *Easter Seal*. The district court in *Easter Seal* had ruled that the hiring party failed to meet the *Aldon* control test. 815 F.2d at 333. Thus, the Fifth Circuit was justified in concluding that an agency law employment relationship did not exist under the facts of that case.

[18] The court in *Tieberg* unanimously affirmed a lower court judgment that "free-lance" writers of certain television shows are "employees" of the producers of those shows (for purposes of the

honey v. *United States*, 216 F. Supp. 523, 528 (E.D. Tenn. 1962) (Restatement factors "looked to only to aid in determining" whether the control standard has been satisfied); *Franklin* v. *Puget Sound Tug & Barge Co.*, 21 Wash. App. 517, 586 P.2d 489, 493 (1978). Because the record contained substantial evidence demonstrating CCNV's control over Reid's efforts, the perceived absence of certain Section 220(2) factors should not have been accorded decisional significance by the Court of Appeals.

Finally, the few facts cited by the Court of Appeals fail to support its conclusion that an agency law employment relationship did not exist between CCNV and Reid, particularly when considered in light of the totality of the circumstances of this case. For example, the Court of Appeals emphasized that Reid "donated his services." 846 F.2d at 1494 n.11 (App. 19a). Section 225 of the Restatement, however, provides: "One who volunteers services without an agreement for or expectation of reward may be a servant of the one accepting such services." Where control is present, the courts have found those who donate their services to be agency law employees. *See, e.g., In re Read's Petition*, 224 F. Supp. 241, 246-47 (S.D. Fla. 1963); *Bond* v. *Cartwright Little League, Inc.*, 112 Ariz. 9, 536 P.2d 697, 701-03 (1975); *Duffy* v. *Harden*, 179 N.W.2d 496, 502-03 (Iowa S.Ct. 1970). The same result has been reached in the copyright context as well. *See* 1

California unemployment insurance law). The court did so, applying the Restatement control test and notwithstanding the facts that the writers "worked on their own time, at their own expense, in their own way, with their own instrumentalities, and at a place of their own selection"; that the producers did not employ the writers on any regular or continuous basis and did not enjoy their exclusive services, but simply paid the writers on a per-work basis; and that each writer "conceive[d] and develop[ed] his own ideas" for the stories and then presented them to the producers. *See also Ringling Bros. & Barnum & Bailey Combined Shows, Inc.* v. *Superior Court*, 140 Ariz. 38, 680 P.2d 174, 178 (1984).

Nimmer on Copyright § 5.03[B][1][a] at 5-12 to 5-13 & n.17 (1988).[19]

III. THE TERM "EMPLOYEE" IN THE WORK FOR HIRE DOCTRINE IS NOT NARROWLY CONFINED TO FORMAL, SALARIED EMPLOYEES; EVEN IF IT WERE, THE DISTRICT COURT'S JUDGMENT SHOULD NOT HAVE BEEN REVERSED

A number of artist groups appeared together as amicus before the Court of Appeals below, and argued that the term "employee" in the 1976 Act should be confined to "formal, salaried employees who receive traditional employment benefits." This view has never been adopted by any of the circuits, and was expressly rejected by the Fifth Circuit in *Easter Seal* and the Second Circuit in *Aldon*. However, it has been incorporated in certain bills which Senator Cochran (D-Miss.) introduced into the

[19] The other facts cited by the Court of Appeals also fail to support its conclusion. *First*, Reid may have "worked in his own studio," but CCNV paid to maintain that studio during the CCNV project. *See* Restatement § 220(2)(e) (relevant inquiry is who "supplies" "place of work"). *Second*, Reid may have "personally engaged" certain assistants, but all of them were paid, in accord with the agreement between CCNV and Reid, with CCNV funds. Furthermore, perhaps the most important of these assistants—Tom Lewis, the artist active in the homeless cause—was originally contacted by CCNV about the "Third World America" project and served as CCNV's liaison with Reid. *Third*, while "creating sculptures" is not CCNV's "regular business," the supervising of creative work designed to benefit the homeless is an essential part of CCNV's regular activities. *Cf. Tieberg*, 471 P.2d at 982 n.8.

The Court of Appeals also said it "did not understand CCNV to contend" that Reid was an employee under agency law. CCNV, however, maintained throughout the proceedings before the District Court and Court of Appeals that Reid was CCNV's employee by virtue of CCNV's control over Reid's efforts. Control is the relevant criterion under agency law. *See also* 846 F.2d at 1492 n.10 (App. 14a) (permitting Reid to advance agency law standard even though he had relied upon *Aldon* standard before District Court).

99th and 100th Congresses.[20] Neither of these bills has had any cosponsors and neither was reported out of committee, although it appears that Senator Cochran has been promised a hearing during the next Congress. *See* 134 Cong. Rec. S14563 (daily ed. October 5, 1988) (statement of Senator DeConcini).

Petitioners understand that the artist organizations will submit their "formal" employee theory to the Court in the present case. Petitioners will respond, in their closing brief, to the artists' specific arguments as may be necessary. However, Petitioners note that, for the reasons already discussed in Section I above, Congress never intended to restrict the term "employee" in the 1976 Act to "regular, salaried employees"; moreover, the policies underlying work for hire specifically and copyright generally are not served by replacing the standard of creative supervision and control with a "salary" standard.

Two additional points also should be noted. *First*, when originally asked by Congress to comment on the artists' salaried employee amendment, the Copyright Office made clear that Congress, in the 1976 Act, did not restrict an employment relationship to "regular salaried" employment. According to the Copyright Office, the determina-

[20] S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986). Two of the artist organizations who participated in the amicus brief below appeared before Congress in 1982 and testified that, under the 1976 Act *as it was enacted and currently reads*, "essentially, common law standards for distinguishing between an employee and an independent contractor must be used" for determining the applicability of the work for hire doctrine. They argued, however, that this approach "causes great uncertainty." Accordingly, they urged Congress to *amend* the 1976 Act by confining the term "employee" to "salaried employee." *Hearings Before the Senate Comm. on the Judiciary on S. 2044*, 97th Cong., 2d Sess. 40-41 (1982) (supplemental testimony of the American Society of Magazine Photographers and the Graphic Artists Guild).

tion of what constitutes an employment relationship under the 1976 Act's work for hire doctrine is left

> to private contractual relations as interpreted by courts under the general law of agency. . . . A long history of case law, on which industry and employment practice rely, defines those works which are or are not prepared as part of the employee's duties. The nature of compensation paid to the employee is not always determinative. Thus, as stated in NIMMER ON COPYRIGHT § 5.03(B) (1982 Supp.),
>
> > ". . . [o]ne may be an employee regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if the writing is done as an accommodation with no compensation at all. *The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work.*" (Case citations omitted).

Letter from Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, to Senator Thad Cochran at 4 (January 25, 1983) (reproduced in the Appendix hereto at 6a) (emphasis added). The Copyright Office stated that, as a matter of policy, it would probably not favor the salaried employee amendment because the existing judicial approach "allows for accommodation to longstanding business practices" and because that approach had not resulted in any "body of proven abuses or inequities." *Id.*[21]

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[21] The Copyright Office did characterize its views in the above-mentioned letter as "preliminary"—although it is unclear whether this referred to the Copyright Office's policy recommendations (*i.e.*, that a salaried employee amendment not be adopted) or its interpretation of the 1976 Act (*i.e.*, that the term "employee" is defined by reference to considerations of supervision and control and is not limited to salaried employees). In any event, the guidance which the Copyright Office has provided to the public on this issue—

Second, CCNV and Reid entered into a relationship characterized by essentially the same facts that characterize any other "regular salaried" employment relationship. CCNV paid Reid's expenses and closely supervised and directed Reid's efforts while he worked full-time during a seven-week period to meet CCNV's deadline and comply with CCNV's instructions. Throughout this period Reid was not treated any differently than any CCNV member who undertakes a particular CCNV project to benefit the homeless. To be sure, Reid did not receive a "salary" as such; he voluntarily waived any claim to direct compensation other than reimbursement for what he considered his "costs." However, there is no reason to believe that Congress intended the mere payment of a salary and employment benefits (both of which could, even under the salaried employee theory, be quite minimal) to have any greater copyright significance than the providing of other forms of compensation that were given Reid (such as widespread exposure of the work and identification with a worthwhile cause). *See* 1 *Nimmer on Copyright* § 5.03[B][1][a] at 5-12 to 5-13 & n.17 (1988).

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guidance which influences industry practices—is squarely contrary to the salaried employee theory. *See* Compendium (II) of Copyright Office Practices § 615.04(a) (February 1988) (Copyright Office will not question, for purposes of registering a work for hire, an "application where it appears that an unpaid volunteer contributed to a work made for hire"); Copyright Office Circular R-9 (December 1985) ("[T]he law does not define 'employee' or 'scope of employment.' In the absence of definitions of these terms or much case law bearing on the issue, general principles of agency law may apply . . . . Under the principles of agency law, consideration is given to the amount of supervision and control exercised by the employer. The nature of compensation may also be a factor although it is not necessarily a determining element").

CONCLUSION

The Court of Appeals erred when it reversed the District Court and concluded that the work for hire doctrine is inapplicable in the circumstances of this case. The judgment of the Court of Appeals, therefore, should be reversed. Alternatively, if the Court concludes that the District Court applied an incorrect legal standard, this case should be remanded to the District Court with instructions to consider the applicability of the work for hire doctrine to the facts of this case under the proper standard.

Respectfully submitted,

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December 22, 1988

APPENDIX

APPENDIX

January 25, 1983

The Honorable
Thad Cochran
United States Senate
321 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Cochran:

This responds to your request for comments by the Copyright Office on the testimony at the Senate Judiciary Committee's October 1, 1982 hearings on the work made for hire provisions of the Copyright Act and specifically on the supplemental legislative proposals of the American Society of Magazine Photographers and the Graphic Artists Guild for amending those statutory provisions.

The Register of Copyrights regrets that his schedule (submission of a report to Congress on library photocopying, and participation in a New Delhi meeting on development cooperation between developed and developing countries) has not allowed him sufficient opportunity to review the work for hire proposals in depth. He has, however, authorized me to express the tentative preliminary views of the Copyright Office in response to your request. The Register anticipates further study of these issues, which may lead to modification of the tentative views herein expressed.

The Copyright Office shares your views that the purpose of the work for hire provisions of the Act is to protect the rights of authors and creators while providing to publishers the usage rights they need. This, of course, was the avowed intention of Congress throughout the lengthy consideration of the work for hire provisions during the more than a decade-long effort to revise the copyright law generally. As the record shows, all parties concerned received repeated opportunities to present their views to Congress throughout this revision process. How-

ever, although the new Act gave artists and other creators substantially strengthened legal protection in potential work for hire situations, the Copyright Office supports the continued efforts of Congress, through forums such as the October hearings, to keep abreast of trade practices that reveal how the law is operating. The relationship between creators of copyrighted works and the entrepreneurs, including publishers, broadcasters, motion picture producers and others who risk capital to further the dissemination of those creative works, is a significant matter of continuing concern.

Testimony at the October hearings elicited the views of illustrators, magazine photographers, and authors, and of magazine, textbook and business publishers, and motion picture producers on your bill, S. 2044 (97th Cong., 2d Sess. (1982)). That bill would amend the copyright law's definition of a "work made for hire" by excluding contributions to collective works, motion pictures and other audiovisual works, and instructional texts from the § 101(2)[1] category of commissioned works that may be considered works made for hire provided a written agreement to that effect is signed by both parties. At the hearing, creators argued in favor of the bill, arguing that publishers presently force creators to sign work for hire agreements, depriving them of all control over subsidiary rights to their great economic detriment. Publishers, on the other hand, stressed that the law as written represents a well-considered compromise that contains built-in author safeguards which should be allowed to stand. They say the vast majority of authors are fairly treated by publishers who assume the financial risk of disseminating creative works, and that to upset the legislative scheme would seriously impair publishers' ability to obtain the clearances necessary to market works. For-hire agreements, they say, are voluntary; and contract negotia-

[1] The 1976 Copyright Act, title 17 of the U.S. Code, §§ 101 et seq. All references to sections of a statute refer to this Act.

tions, rather than statutory amendments, should be relied upon to solve isolated problems.

At the hearings, and by a supplemental submission to the Judiciary Committee, the Graphic Artists Guild (and the American Society of Magazine Photographers) argued for an additional statutory amendment of the works for hire provision, going well beyond that embodied in S. 2044.

GAG argues that "in practice, work for hire has been used to secure [the exclusive rights constitutionally intended to benefit authors] . . . for commissioning parties instead of the true free-lance creator." They say that, in the case of commissioned works, the financial risk assumed by the publisher is minimized by the artist's risk. Commissioned photographers, they argue, are not paid prior to the commencement of an assignment. Their work product must be satisfactory to the publisher, and the artist must indemnify the publisher against risks of copyright infringement. The artist must supply his equipment and bear his own overhead costs. In short, they argue, commissioned photographers do not enjoy employee benefits; and, the photographer is principally responsible, creatively and financially, for the existence of his creative work. In addition, they argue that, while these independent creators do not enjoy traditional employee benefits, they are legally precluded from bargaining collectively.

The Graphic Artists Guild proposes amendments to alleviate the perceived plight of these creators. As you know, my staff and I have discussed these proposals informally with your staff. I shall discuss each of the GAG proposals separately, explaining the provisions of the statute as written with brief references to legislative history, and then comment upon the projected effect of each proposed amendment.

I. *When Must a Work For Hire Contract be Signed.*

GAG argues that, contrary to the intent of the 1976 Copyright Act, publishers frequently demand work for hire contracts after a work assignment is underway or completed. They propose amending the law to enable commissioned works to be considered works made for hire only if the parties so agree in a written instrument signed "prior to the commencement of any work."

Section 101(2) of the Copyright Act presently states that any of the enumerated categories of specially ordered or commissioned works may be considered as a work made for hire "if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." Although the law does not specify a time frame within which work for hire agreements must be signed, legislative history, cited by the Guild in its supplemental statement, clearly establishes the drafters' intent that such agreements should not be permitted after the work was written. Thus, the Office probably would support the proposed amendment in principle. However, we believe it unnecessarily restricts the scope of commissioned works for hire by providing that once "any work" has begun, the resulting piece could never be considered a commissioned work for hire. The proposal is so broad that, conceivably, even if an author had jotted down an idea or theme, his or her work would be legally barred from being considered a commissioned work for hire.

In our view, a more appropriate amendment to accomplish the intended purpose of prohibiting publishers from extracting work for hire agreements for completed works, or those that require only minor editorial revisions, would foreclose creation of a substantial part of the work before execution of the written agreement, if the work is to be deemed one made for hire.

II. *Ownership of the Physical Work of Art.*

GAG argues that creators of works made for hire should be presumed to have retained property rights in their (often valuable) original creations, and that the law should be amended to provide that, absent a written transfer of property rights in the material object, a work for hire agreement conveys no rights in the material object.

Section 202 presently reflects the traditional copyright law presumption that the author (including the employer in the case of works made for hire) owns distinct rights both in the physical property and the literary or artistic property. This is a fundamental principle of the new Copyright Act, whose retention would probably be favored by the Copyright Office.

If the GAG amendment were adopted, the "author" of commissioned works made for hire (*i.e.*, the commissioning party would be required to obtain ownership of both the physical work and the copyright in order to exploit the work. Otherwise, he might be held to common law bailee duties with respect to the physical object. And, the amendment would blur the § 202 distinction between physical and intellectual property, leaving unclear what rights of use are enjoyed by the owner of the physical property of a copyrighted work.

III. *Who is An Employee.*

GAG argues that the law presently leaves unclear who is an employee for purposes of § 101, to the detriment of non-salaried creators such as those paid on a fee basis or in royalty form, who might still be regarded as employees under case law. It proposes amending the § 101(1) definition of employees to restrict the definition to "salaried employee(s)" to prepare works within the scope of their employment.

The present law defines all works prepared by an employee within the scope of employment as works made for hire. § 101. The statute does not define when a work is made "within the scope of employment," but leaves that determination to private contractual relations as interpreted by courts under the general law of agency. The principle of the employer being regarded as the author of works made for hire is basic, and dates back beyond the 1909 copyright law. Copyright Law Revision Study 13, S. Judiciary Comm. Print (1960). A long history of case law, on which industry and employment practice rely, defines those works which are or are not prepared as part of the employee's duties. The nature of compensation paid to the employee is not always determinative. Thus, as stated in NIMMER ON COPYRIGHT § 5.03(B) (1982 Supp.),

> ". . . [o]ne may be an employee regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if the writing is done as an accommodation with no compensation at all. The crucial question in determining an employment relationship is whether the alleged employer has the right to direct and supervise the manner in which the writer performs his work." (Case citations omitted).

Because this provision allows for accommodation to long-standing business practices, which are always subject to the substantial historical body of case law, and in the absence of a body of proven abuses or inequities (even the *Aitken* case cited in GAG's statement held the architect in question was not an employee), the Copyright Office probably would not favor amending the law at this time.

IV. *Categories of Commissioned Works that May Qualify as Works for Hire.*

GAG proposes amending clause (2) of the present statute's § 101 definition of specially commissioned works

that may qualify as works made for hire to exclude contributions to collective works, audiovisual works other than motion pictures, supplementary works, instructional texts, and atlases other than "bound collections of maps." None of these commissioned works could qualify as works made for hire under the GAG proposal.

The present law contains significant safeguards for both creators and exploiters of collective works. It defines periodical issues, anthologies, and encyclopedias that consist of a number of contributions constituting separate and independent works assembled into a collective whole as "collective works." § 101. Section 201(c) provides that "copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." Absent an express transfer of copyright, the owner of copyright in the collective work is presumed to have acquired "only the privilege of reproducing and distributing the contribution as part of that collective work, any revision of that collective work, and any later collective work in the same series." This provision does not change the rights of copyright ownership in collective works under the previous copyright law; but, it does clarify the legal situation with respect to rights in individual contributions. It emphasizes the principle that copyright in the individual contribution is separate from copyright in the collective work. Further, it confirms that the author of the contribution is the first owner of copyright in it, and that the author of the collective work owns rights in such elements as selection, arrangement and assembly of a number of contributions. Absent an employment for hire agreement, or an express transfer of more, the owner of a collective work is presumed to acquire only first reproduction rights and the right to reproduce and distribute the contribution as part of a revision or of a later collective work in the same series.

A complementary provision found in § 404 preserves the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's rights to the owner of the collective work. In the past, publishers have resisted putting separate copyright notices on contributions. If the author had not transferred all rights to the publisher, he or she risked losing copyright if a court found the general notice in the publisher's name inadequate to protect the individual contribution. The new copyright statute clarifies the situation to the author's advantage by permitting a single notice in a collective work to cover copyright in particular contributions. It preserves the author's copyright in his or her contribution even in the absence of a transfer of all rights to the publisher or owner of copyright in the collective work. § 404(a).

The equities balanced by Congress in achieving these statutory provisions are discussed more fully in House Report 94-1476 [2] at 122:

> The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption.

Similarly, the House Report alludes generally to the delicate compromise reflected in defining specially commissioned works, including supplementary works, as ones capable of being works made for hire by written agreements:

> The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section

[2] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

> 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances. H.R. Rep. No. 84-1476 at 121.

GAG's proposal would upset these compromises by excluding contributions to collective works, as well as visual works other than motion pictures from the possibility of qualifying under the statute as commissioned works for hire. In addition, it creates further complications by separating motion pictures from audiovisual works, a category that currently includes motion pictures as well as other works that consist of a series of related images intended to be shown by the use of projectors or like devices.

And, the GAG proposal goes farther by giving contributions to compilations, supplementary works, instructional texts and audiovisual works other than motion pictures a new statutory presumption, similar to that extant under § 201(c), that, absent other agreements or transfers, the owner of copyright in the larger work acquires only the right to reproduce and distribute these aforementioned works as part of the larger work and any revisions of it.

Moreover, GAG's proposal would require any express transfer of an author's work in any of these categories to enumerate the rights being transferred; any of the rights not exercised within two years would become nonexclusive with respect to the publisher, and the author would be able to resell such rights on a nonexclusive basis.

Finally, the amendment would allow an author to waive his or her termination rights for these categories of

works if the parties have agreed (in writing, before commencement of the work) that they will be nonterminable.

The Copyright Office would probably take the position that this proposal is unwarranted. It creates a statutory presumption that all works that may presently be commissioned as works for hire other than translations, tests, and certain atlases, have been prepared in an individual capacity rather than as works made for hire. Absent an advance waiver of termination rights, the individual author of any such contribution would be the initial owner of copyright; and the term of copyright protection in such work would be measured by each individual author's lifetime and would be subject to the individual's right to terminate that transfer. Clearance and reprint rights procedures for publishers, who commonly sign "for hire agreements," again the subject of much congressional consideration,[3] would be vastly complicated, and business practices would have to be drastically altered.

Even more radical is the practical nullification of all-rights publishing contracts by the two-year exercise proviso. If a publisher, for example, published a work but failed to sell foreign rights within two years, the author would then be free to resell them. The author could duplicate profits from the sale of a single right, and the publisher could lose the benefit of its bargain, for which it had paid. This would represent a major change from existing business practice by which a publisher acts as a clearinghouse for subsidiary rights, often on behalf of the author. By creating added problems of clearance, it would adversely affect educators and other users. Finally, the Copyright Office suspects it might ultimately prove to be an unintended detriment to authors, for publishers would undoubtedly pay less for purported all-rights contracts knowing that some rights

[3] *See* H.R. Rep. No. 94-1476 at 124.

might well prove nonexclusive. And, publishers would have little incentive to assume the financial liability of promoting the sale of subsidiary rights given the risk that publisher benefits from such sales might be lost if negotiations were not successful within two years.

V. *Unconscionable Tranfers.*

Finally, the GAG redraft would amend § 201 by adding a new subsection (f) to permit a court to terminate or reform any transfer *at any time* if it proves "unfair or grossly disadvantageous to the author."

The Copyright Office's tentative view is that this proposal is inequitable to publishers who assume the substantial financial risks of publishing and marketing copyrighted works. It applies across the board to all copyrighted works and could preclude publishers from enjoying anything beyond marginal profits from their publishing contracts.

Conclusion.

In conclusion, because the proposed GAG redraft alters the delicate author-employer balance which was recently achieved (after much legislative debate) in the 1976 Copyright Act, and because the proposal is so drafted that it may subvert even its own intended individual author benefits, the Copyright Office probably would not support it at this time.

The Office is aware of, and concerned about, same reported abuses of the present law's for-hire provisions such as exacting for-hire agreements for commissioned works. However, on balance, we are unable to support GAG's proposal because we believe it would severely interfere with private employment contracts and would place publishers and other exploiters of copyrighted works under very severe, if not crippling, constraints in marketing their works. In addition, users who traditionally seek

reprint permission from publishers would be faced with the herculean burden of either tracking down individual authors for permission or risking copyright infringement. These drawbacks, it seems, outweigh the sympathies one feels for individual authors who lack the bargaining power to resist isolated unfair publisher practices.

On the other hand, some of the principles embodied in the proposal, especially that proposing to clarify the point in time when a work for hire must be signed, are useful and should be adopted. The Office believes the Judiciary Committee's hearings were useful in continuing to present authors' and publishers' concerns with respect to work for hire practices, and we would be pleased to continue to work with your staff in considering possible future efforts to modify these provisions of the Copyright Act.

Yours truly,

/s/ Dorothy Schrader
DOROTHY SCHRADER
Associate Register of Copyrights
for Legal Affairs